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Contraception and Abortion of Mentally Handicapped
Female Adolescents under German Law

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Abstract. Contraceptive measures and, in case those are not applied or fail, subsequent abortion still pose special problems with regard to mentally handicapped adolescents. In Germany this is particularly true with regard to sterilization since this device was terribly abused during the Nazi era. Since there are not yet any special regulations for handling contraception and abortion with regard to mentally handicapped adolescents – a situation likewise existing in many other countries – the question arises what, according to general rules, parents should be allowed to do and ask for, what measures homes or other protective institutions should be allowed to take and what limitations should be considered. After distinguishing various medical procedures and the different types of adolescents concerned, this article, in its main part, gives an overview of the present practice of sterilization in Germany, thereby paying special attention to problems of consent and its substitution by the parents, the classification of cases in which sterilization might be indicated, and procedural safeguards. After a short discussion of temporary contraceptive measures, finally some special problems of abortion with mentally handicapped adolescents are dealt with.

At first sight, the title of this paper seems rather academic. When we look more closely, however, it reveals problems of a highly explosive social and political nature. This is particularly so if we think of permanent contraceptive procedures such as sterilization. Since there was awful abuse of this measure during the German National Socialist period, this is still a very touchy problem [1]. Nonetheless, we must concede that contraceptive measures with regard to a mentally handicapped, yet still sexually fully active adolescent might become very urgent. In such a case, what should parents be allowed to do and ask for? What measures should homes or other protective institutions for the mentally handicapped be allowed to take? What limitations are imposed in this respect by contemporary German law? The purpose of this survey is to pursue some of these questions. At

first, however, it will be necessary to identify certain problems arising within the framework of this topic.

1. Some Necessary Distinctions

Medical Procedures Requiring Differentiation

Medical procedures exhibiting certain common features by virtue of their sexual reference and on account of specific problems concerning the mentally handicapped are covered under the topic "contraception and abortion," although from a legal point of view questions of a widely differing nature arise according to the type and aim of the procedure concerned. Consequently, it becomes necessary at the very outset to distinguish between the following procedures:

- On the one hand, there are *temporary contraceptive* measures such as the prescription of ovulation inhibitors, the insertion of spirals, or the injection of contraceptives.
- On the other, there are much more radical *permanent contraceptive* procedures such as sterilization.
- Finally, there is the termination of an already existing pregnancy by *interruption*, a procedure which is fundamentally different from such contraceptive measures as those mentioned above.

"Adolescence" not Equatable with "Minority"

Our topic is restricted to that group of mentally handicapped persons who are "*female adolescents*." As far as age is concerned, we are dealing here with persons who for biological reasons must already be considered amenable to contraceptive measures, i.e., young persons from about the age of 12. On the attainment of majority in terms of § 2 of the German Civil Code, adolescence in the medical sense does not cease; nevertheless, the legal issues involved assume a new guise. I shall return to this point later.

In the presentation of the topic only *female* adolescents are mentioned. This corresponds with the state of debate so far. There has been hardly any discussion of measures for the prevention of fertility in men, although it is incontestable that the male sex ought particularly to be included in reflections on sterilization. This also applies to the mentally handicapped.

"Mentally Handicapped" not Equatable with Absolute Incapacity to Consent

In considering procedures affecting the fertility of the mentally handicapped, we cannot avoid taking a closer look at what is to be understood by "*mentally handicapped*." From a medical point of view we are concerned here with persons suffering from mental defects indicating a considerable degree of health impairment, where such defects may be inherited or transmissible (but not necessarily so). A mental defect becomes a legal problem mainly because the affected persons

themselves are generally unable to make the necessary decisions on birth planning or control because of their age and mental inability. Thus, the question arises of whether and to what extent it should be permitted for birth prevention measures necessary to be taken by others as representatives or even on a mandatory basis. Here an immediate warning must be given against a short-cut equation of “mental infirmity” with “incapacity to consent,” for the latter crucially depends on the capacity to understand the nature and significance of a concrete measure. Whether the capacity to consent is later established or not, mental infirmity as such is already sufficient cause for raising the question of whether and to what extent contraceptive precautions or, if necessary, an abortion ought to be considered. In the examination of this question a number of reasons could be taken into account – but without my wishing fully to adopt any one of them:

- The prevention of danger to life or health of the person concerned.
- The avoidance of offspring with an hereditary disease.
- The fact that persons suffering from a severe mental infirmity would not themselves be able to look after, educate and maintain their children, so that the latter, even if healthy themselves, would almost certainly be committed to a life spent in homes.
- The experience that particularly the category of persons being considered here not infrequently exhibit an above-average degree of sexual activity [2].
- And last but not least, the observation that new conceptions for treatment and integration of the handicapped are connected with greater encouragement to enter into sexual relationships and that, for this very reason, the danger of sexual abuse is increased [3].

For all these reasons, questions of birth control, as they affect the mentally handicapped, are to be welcomed, as they are gradually being divorced from their taboo status, brought about by National Socialism, and are instead opening up new socio-political discussions. Clearly, with such factual complexity as indicated here, legal comprehension also cannot be an easy matter. This is all the more the case since even the legal position of adults and persons of sound mind is not yet fully settled. This especially applies to sterilization – which will be dealt with first, since the multiplicity of problems involved come to light with particular intensity here.

2. Sterilization

Present Legal Practice: Impunity of Voluntary Sterilization

Sterilization must be viewed as the most serious contraception procedure that we are going to consider because it leads to enduring infertility and – at least as far as women are concerned – must be regarded as regularly (still) irreversible. It is all the more regrettable that – at least as far as German law is concerned – the legal position in this field is rather obscure and controversial in certain areas. In order not to burden our consideration of this topic more than necessary by dealing with disputed legal points, I shall refer here only to the opinion of the Federal Supreme Court (*Bundesgerichtshof*), which constitutes the most decisive guide to legal

practice. Following the sensational decision in the case against Dr. Axel Dohrn, this court has taken the view that today *voluntary sterilization* is no longer an offence under criminal law [4]. The consequences of this are mainly twofold:

- First, that *informed consent* is to be regarded as both a necessary and sufficient condition for the impunity of sterilization.
- Second, that sterilization is not to be subjected to a “*morality test*” as would be required according to § 226 a of the German Penal Code if sterilization were still covered by the penal provision on “physical injury” (§ 223) [5].

In other respects, much remains unsettled. As the Federal Supreme Court has, on the whole, only had to concern itself with voluntary sterilization, there has been no clarification at the highest judicial level of the prerequisites for sterilization of minors and/or the mentally handicapped. Consequently, there must be recourse to general principles of consent, and we must work on the basis that the admissibility of a sterilization will depend singularly and crucially on there being effective consent. Thus, in addition to the other requirement that a physician should be consulted (which will not be further discussed here), the capacity to consent of the person to be sterilized will become the central problem of admissibility. In view of this, the following questions arise regarding the sterilization of mentally handicapped female adolescents:

- To what extent is the young person capable of consent at all?
- To what extent are there special restrictions applicable to the mentally handicapped?
- How far can a lack of capacity to consent on the part of the mentally handicapped be replaced by the consent of others (in particular, by the consent of the parents or some other statutory representative)?

General Capacity of Minors to Consent

It is useless to search the statutes for a clear answer even to this question. Given that there is no express statutory regulation on the general prerequisites for consent, it is not surprising that the German Penal Code is also silent on the question of capacity to consent. Nonetheless, it is possible in the light of settled judicial opinion to work from the following principle: the capacity to consent of the individual affected, as required for medical procedures, is not to be equated either with “majority” or with “capacity to make legal transactions” under civil law. What is alone decisive is rather the “*natural capacity to understand and discern.*” This may be related to age and maturity but does not depend on a fixed age limit. Capacity to consent may (already or still) be assumed if the patient is capable of fully appreciating the nature and significance of the medical procedure to be applied in her case [6].

The distinction between capacity to consent and legal majority obviously has the disadvantage that a physician must establish in each individual case whether he/she is dealing with a patient capable of consenting or not. Thus, in order to give doctors at least some help in making their decision, attempts have been made to find general criteria to which their evaluation can be adjusted. This has also

occurred with regard to sterilization, although there are a number of different views as to the conditions – particularly age – under which the capacity to give effective personal consent to an operation of such wide significance can be assumed:

- According to a very strict doctrine a decision of this kind entails a degree of life experience which even persons that have just attained their majority do not as a rule possess. Consequently, as long as voluntary sterilization continues to remain unregulated by statute, it will be necessary to proceed according to the example of the Castration Act on the basis of a minimum age of 25 years for capacity to consent [7].
- Other authorities, however, adhere to the view that such a “partial minority of persons of full age” [8] is impossible under existing law. Although the 25-year limit is desirable from a legal policy point of view [9], its adoption, however, would require express statutory stipulation. Thus, as far as the present position regarding legal status is concerned, we are compelled to work on the assumption that every person of full age and sound mind is fully capable of consenting and enjoys unlimited power to make his/her own arrangements [10].
- Yet, if one seriously considers that there is always something arbitrary about age limits, given the individual nature of the maturing process and the diversity of medical issues, then until the legislature undertakes a classification of types through fixed age limits one will not, on principle, be able to exclude the possibility that minors might also be able to give effective consent to sterilization in appropriate cases [11].

Absence of the Exclusive Capacity to Decide on the Part of the Mentally Handicapped

Thus, if minors are also considered basically capable of consenting, the question arises as to the conditions under which such consent may be given. This is a particularly crucial question as far as a mentally handicapped adolescent's consent to sterilization is concerned. As in the case of other medical measures, the capacity to consent does not simply mean the ability to say “yes,” but instead presupposes the capacity of being able adequately to assess both the pros and cons regarding the significance and extent of the operation to be performed, and of being able to make a decision accordingly [12]. The capacity to consent not only has an intellectual aspect; life experience and matters of conscience also play a role. As we are not dealing here with quantifiable factors, psychological testing procedures such as intelligence tests do not help much. They are not useful for our purposes, as their results cannot be used to answer concrete questions relating to intellectual abilities and maturity of character, as would be needed for an assessment of the significance of sterilization. At the most, one might take the negative view that below a certain intelligence quotient – to be set at a very low level – we may rule out the possibility that the person concerned will possess the requisite capacities for a personal decision regarding the operation. Care must be taken here as regards positive deductions. Thus, it might be possible to draw conclusions relevant to the capacity to decide from examining the nature and severity of the mental deficiency and, in doing so, ultimately to the patient's condition as a whole. Clearly, statements of a more precise nature would necessitate interdisciplinary contacts of ever-greater

depth so as to reduce the ignorance of lawyers and misinformation regarding psychiatric illness and, on the other hand, to eliminate misunderstandings on the part of psychiatrists regarding the legal implications.

It is, however, possible to make a few observations. It cannot, in principle, be ruled out that the mentally infirm (including those who do not have the capacity to make legal transactions) may themselves be in a position to give effective consent to the execution of a medical procedure having permanent consequences – and may thus be able to give their consent to a sterilization operation; nevertheless, the younger the patient, the more ignorance, inexperience and instability related to age must be added to the inadequacies of mental performance resulting from the illness. If the patient is still a minor, the risk of an irreversible and mistaken decision being taken is so great that the right to an *exclusive personal decision* would be *indefensible*. It is undeniable that in terms of developmental psychology the maturing process is a matter of gradual advance, and that for this reason any temporal caesura has something arbitrary about it. Consequently, there may be rare cases where inappropriate restrictions are placed on a young person's power to decide; however, this price will have to be paid for the sake of averting mistaken decisions of a very serious nature in by far the greater number of cases. This is all the more so since a responsible young person will, on principle, not make decisions of such importance without first discussing the matter thoroughly with members of the family [13].

Substituted Consent of a Statutory Representative

If a patient is to be deprived of his power to decide himself and it is not intended to dispense with the operation, rules will be needed to provide for substituted consent. Two possibilities of varying substance are imaginable:

- Either the consent of a statutory *representative* will have to be *substituted* for personal incapacity to consent,
- or *mandatory* sterilization will have to be permitted by statute on specified grounds.

Since the latter method is correctly regarded as taboo after the malpractices of the National Socialist period [14], there remains only the possibility of the substituted consent of the parents or some other statutory representative. But as the latter should on no account be permitted, in the manner of a despotic regent, to make dispositions regarding the legal interests of others, there are two tasks facing the legal regulation of consent by representation: on the one hand, there is the issue of determining the person entitled to act as representative and, on the other, the issue of delimiting the powers to be granted to a representative.

Parents are, as we know, *authorized to represent* their minor children. By virtue of § 1626 of the German Civil Code both father and mother have the right and duty to “care for the person” of their child. This includes the responsibility for ensuring the necessary medical attention [15]. As regards mentally handicapped children living in homes, the duties of the parents are not infrequently taken over by a *guardian* [16], as happens in relation to mentally incapable adults who are

unable to run their own affairs [17]. Where there is only a limited need for assistance in such cases, the appointment of a special guardian for the handicapped (the so-called *Gebrechlichkeitspfleger*) may suffice [18]. If a doctor has to deal with such a person, there will not as a rule be any need to check the authority of the person claiming the right of care.

The *extent of the powers of representation* enjoyed by the person with the right of care deserves much closer attention, for only insofar as this person keeps within the limits of his representative powers may a doctor work on the assumption that there has been effective consent to the sterilization. Thus, the purpose and limits of the power of representation are crucially important. The key norm in this respect is § 1627 Sect. 1 of the German Civil Code, according to which parents – and the same is true of guardians in relation to their wards – exercise “parental care on their own responsibility and in mutual agreement for the welfare of the child,” and in doing so they are subject to the guardianship court as “watch-dog” [19]. This regulation is also important in the field of medical activity because there are no other special statutory provisions. Obviously, however, it is too generally phrased for one to be able to draw direct conclusions regarding concrete medical treatment. For this reason, the interpretation of “*welfare of the child*” is decisive: only if the assumption can be made that sterilization will – at least – serve the welfare of the mentally infirm patient can the statutory representative’s consent thereto also have the effect of excluding the possibility of punishment. In order to facilitate an assessment of this question in individual cases it is advisable to adopt a *classification of types based on specific grounds or (so-called) “indications,”* whose presence may, as a rule, justify the assumption that sterilization will serve the welfare of the child. The following reasons for sterilization – in some sense, parallel to the catalogue of indications for abortion contained in § 218a of the German Penal Code – must be considered.

Medically Indicated Sterilization

Sterilization is the least problematic if it must be carried out to avert danger to the life or health of a mentally handicapped adolescent, where such danger is greater than the impairment of physical integrity that would result from the sterilization operation itself. This applies in any event to those (not very frequent) cases where a *medico-therapeutic* indication is present, so that sterilization is necessary for treatment of an existing ailment.

It is much more difficult to give concrete shape to the *medico-prophylactic* indication. How great must the impending health risks be? What degree of certainty must the prognosis of such dangers display? How far must recourse be had to alternative methods of treatment that are less radical on account of their not being irreversible? The 1972 draft of the Fifth Penal Law Reform Act, which went beyond abortion reform to include sterilization provisions, embodied a very strict indication [20]. The person concerned would have to be incapable of consenting indefinitely, and treatment would have to be necessary for the elimination of an otherwise unavoidable risk of death or complete collapse of health [21]. Through the adoption of such a narrow indication comparisons with the compulsory sterilizations of National Socialism were intended to be deprived of foundation. However under-

standable this anxiety may be, it does seem as though too little attention has been paid to the interests of the handicapped themselves. It is certainly correct only to permit sterilization as a measure of last resort and, accordingly, to require that the objective pursued should not be attainable by less radical means. The principle of proportionality would itself enjoin this. However, to restrict sterilization to cases where the complete collapse of the patient's health must be avoided appears overanxious and too narrow an approach [22]. Such a limitation is also not called for by existing law.

As a result, it would probably be more appropriate to take one's orientation from § 218 a, Sect. 1, No. 2, of the Penal Code, that is to say, medico-prophylactic sterilization would be allowed where, in the case of a pregnancy, termination would be indicated to avoid serious impairment to physical or mental health and where there is no prospect of improvement in the patient's health [23]. Sterilization would be permitted in such cases because it would amount to the lesser evil in comparison with the concrete risk that a pregnancy would have to be terminated in a not inconsiderable number of cases [24].

Genetically Indicated Sterilization

Although discussion of the medical indication in relation to the mentally handicapped has now become less subject to prejudice in the Federal Republic of Germany, there are still signs that the past has not been "overcome" as far as the genetic indication is concerned. Thus, the draft of the Fifth Penal Law Reform Act was still quite decidedly against allowing sterilization on eugenic grounds of persons incapable of giving their consent; the 1970 Alternative Draft for a Penal Code also kept this problem out of bounds of the criminal law [25]. On the other hand, the proponents of making some provision for substituted consent in this case have recently started growing in number [26]. They are agreed that eugenic and population aspects should not play any role here – and not only for purely ethical reasons [27].

Genetically indicated sterilization will have to be seen as running parallel, as it were, to abortion under the law already in force (§ 218 a, Sect. 2, No. 1, of the Criminal Code). As we have already seen in the case of the medico-prophylactic indication, it cannot be ruled out that early sterilization will constitute the lesser evil in relation to a later series of abortions [28]. That the representative whose consent will be required may run into even greater conflict than in the case of the medical indication cannot be overlooked [29].

Sterilization Indicated on Familial and Social Grounds

As in the case of an abortion to avert some other precarious situation (the so-called "*allgemeine Notlagenindikation*" according to § 218 a, Sect. 2, No. 3, of the Penal Code), it might also be apposite to permit sterilization in all cases where through pregnancy the adolescent would get into a socially unacceptable precarious situation [30]. However, in opposition to this conclusion there is the fact that particularly in severe cases of mental infirmity the pregnant female would not

herself be burdened with the consequences of seeing her pregnancy through because the child would in any case have to be removed from her care on account of her inability to look after it. Thus sterilization would serve to relieve pressure on the family or society, but would not serve the personal welfare of the adolescent concerned – as required for the operation to be permissible. Insofar as relief of the family cannot simultaneously be regarded as *indirectly serving the welfare of the mentally handicapped mother* – perhaps because with the arrival of another child she would not be able to receive full parental care – it is not apparent how sterilization of the mentally infirm generally indicated on familial and social grounds could be established without a prior change in the law. For this reason it is absolutely essential that the legislature should concern itself with the problems involved in sterilization on this indication.

At any rate, in some way parallel to the indication for abortion due to some other “precarious situations,” as mentioned above, sterilization may now be considered for a mentally handicapped adolescent in two cases, which at first sight might appear to be in direct conflict with each other but which indeed have a common aspect in an ultimately individual conflict of interests of those concerned:

- On the one hand, there is the case where the requirements of § 1747, Sect. 4, or § 1748, Sect. 3, of the German Civil Code would probably be permanently fulfilled in the event of the pregnancy being brought to completion, namely, that the child could be removed from the care of its mother against her will or would, in its own interests, even have to be taken away. If it were desired in this case to exclude the possibility of legal sterilization, a genuine opportunity would arise for using that nasty expression “birth machine.” Not protecting a woman from getting pregnant and then compelling her to give birth to a child in the certain knowledge that she will never be able or allowed to look after the child definitely seems degrading, quite apart from the question of the future perspectives of the child itself [31].
- On the other hand, sterilization can be considered if it is necessary to avoid denying an handicapped person elementary human development chances. Of course, in such cases, where it is ultimately a question of the integration of the mentally handicapped, the same result can often be achieved with less radical contraceptive measures. In any event, it will always be necessary to examine the question of how far a decision on an irreversible sterilization can be deferred until adulthood, by hoping that the person concerned will then display sufficient insight to be able to reach her own decision on such an operation. Above all, however, where representation is unavoidable, there will have to be very careful balancing so as to achieve the genuine welfare of the person concerned in the clash between free personality development, on the one hand, and protection against unwanted offspring on the other [32]. Obviously it would be too one-sided to view the continual more or less vague expectation of social integration at the expense of reproductive capacity as a fundamentally higher value. Thus sterilization will have to be seen as the lesser evil if the only alternative amounts to permanent medical treatment suppressing the sexual instinct but, at the same time, changing the personality. Even in the latter case respect for personal dignity would demand that action should at least not be taken against the express wishes of those involved in such cases, although they may not be fully aware of all the implications of their refusal.

All these difficulties indicate once again that statutory clarification is urgently desirable.

Institutional Safeguards in Sterilization Procedure

Like the requirements for consent and powers of representation for sterilization, we also find that hardly any of the institutional safeguards have been determined that would be desirable for the decision-making process. Apart from the control of “parental malpractice” by the guardianship court under § 1666 of the German Civil Code – which is more a matter of chance than anything else – the statutory representative is virtually left to make his decision alone [33]. It would therefore be worth considering whether the interests of those concerned should in future be protected through special precautions, as provided – even if in an imperfect form – by the draft of the Fifth Penal Law Reform Act of 1972 [34].

Without further elaboration at this point, provision ought to be made for the following measures:

- The person *to be sterilized* should *participate* to the full extent of her mental capacities in the process of reaching a decision.
- Provision should be made, as in the case of social counselling for abortion under § 218 b of the Penal Code, for an effective system of *consultation*.
- A method would have to be created for *testing* the statutory *representative’s* decision in regard to its compatibility with the genuine welfare of the person concerned.

3. Temporary Contraceptive Measures

As opposed to the usually irreversible infertility procured by sterilization, we are here concerned with measures that are reversible and applicable on flexible time scales. This observation thus leads us to identify their field of application, which arises when the person concerned desires, or it is in the interest of the welfare of that person, to suspend her reproductive capacity at least temporarily but, if possible, not permanently. Such measures are of particular relevance in cases where contraception is advisable, but the question of sterilization is not ready for decision.

The admissibility of such contraceptive procedures may be amenable to a rather more generous assessment than has been the case with sterilization, given that their consequences are less radical. Clearly, careful consideration of individual cases and precise investigation of the necessity for applying a measure – for example in relation to measures restricting liberty – will be required. This may be particularly difficult not only where it is a matter of warding off dangers to the person concerned but also where it is desired to attain an improvement in her status. Although there will also be a number of problems of balance here, it will scarcely be possible to solve them by statutory regulation of a necessarily general nature. A doctor may, in this field, run into conflict with the criminal law where there has been an obvious abuse of the right of care on the part of the statutory representative.

4. Abortion

In relation to the measures discussed up to now, two major differences concerning abortion must be emphasized:

- First, in view of the nature of the operation, it is no longer merely a matter of preventing pregnancy but now concerns the killing of unborn life and thus is detrimental to another legally protected interest.
- Second, the statutory regulation of abortion has already been reformed (§ 218 to § 219 d of the Penal Code), although there are considerable lacunae, especially with regard to minors and persons incapable of consent with whom we have been dealing here. This affects, above all, three questions of practical importance: problems relating to *indications* where a pregnant female is mentally handicapped, a minor's *capacity to consent*, and the *substituted consent* of the statutory representative.

Indication Problems Relating to Mentally Handicapped Pregnant Adolescents

In contrast with Danish and Austrian law, under which an abortion indication is conceded even beyond the three-month limit, where the pregnant female is immature or under age [35], the German Penal Code has *no abortion indication related specifically to the handicapped*. This also applies to abortion where it is feared that *harm to the child* will occur – an indication provided by § 218 a, Sect. 2, No. 1, of the German Penal Code, which should on no account be misunderstood as population eugenics. Neither the infirmity of the pregnant female nor the apprehended harm to the child constitutes in itself a reason for abortion: this only arises when the pregnant adolescent cannot reasonably be expected to see her pregnancy through on account of apprehended irreparable harm to the child [36]. If the unreasonableness of such an expectation is understood in a strictly individual sense, this might even suggest that the more limited a handicapped pregnant adolescent's horizon of experience is, the less an abortion indication for such a person may be considered [37]. It is clear that indications are to be determined in relation to the individual situation of the persons concerned [38]; nevertheless, it is also a matter here of statutory anticipation of conflict situations in accordance with objective criteria [39]. Accordingly, not only the strict *medical indication* of § 218, Sect. 1, No. 2, of the German Penal Code but also the *general indication for a precarious situation* of § 218 a, Sect. 2, No. 3, of the Penal Code are conceivable in relation to the handicapped, whereby similar considerations must arise with regard to the demands that can be made of a handicapped pregnant adolescent, as in the case of contraception through sterilization. At any rate, the possibility of adoption cannot be regarded any more as a reasonable alternative to an abortion [40].

Finally, the so-called *criminological indication* (§ 218 a, Sect. 2, No. 2, of the German Penal Code) may become significant where impregnation of a mentally handicapped person takes place. Insofar as an inability to resist arising from the illness of the handicapped adolescent is misused for the purpose of sexual intercourse and the resulting pregnancy is thus based on an unlawful act under § 179 of the German Penal Code, there is automatically grounds for the performance of an

abortion without there being a need for a special finding that the pregnancy cannot reasonably be expected to be brought to completion [41]. The same applies, to an obviously even greater extent, in the more serious case of rape (§ 177 of the German Penal Code) or sexual duress (§ 178 of the German Penal Code).

Requirement of the Pregnant Adolescent's Consent

Even if one of the indications just mentioned is present, an abortion is not yet justified for this reason alone. Instead, the consent of the pregnant female is also required before an abortion can be performed (§ 218a, Sect. 1, No. 1, of the German Penal Code). Thus, the same issues arise here, regarding the capacity of the mentally handicapped to decide, as in relation to sterilization.

In spite of this, the answers to the question of capacity to decide need not necessarily be the same since requirements are different in each case. In the case of sterilization, the most important hurdle to consent is that the person concerned must be in a position to recognize the permanent effect of the irreversible loss of her reproductive capacity. In the case of abortion, however, it is crucial that the mentally handicapped adolescent be capable of realizing the particular significance of killing unborn life and consequently does not merely conceive of abortion as interference with her physical integrity alone [42]. It might be easier to make this comprehensible with the result that a mentally handicapped female adolescent's personal capacity to decide may, with greater likelihood, be assumed in the case of abortion than in the case of sterilization.

Co-decision of the Statutory Representative

As a rule, it will be necessary to proceed on the basis of a need for representation [43]. The required (substituted or additional) consent of the parents or some other statutory representative will scarcely be easier to attain than in the case of sterilization; here, too, a high degree of empathy will be required to ascertain the genuine welfare of the pregnant person: her natural right to the child, on the one hand, or otherwise the interests embodied in the indications enumerated in § 218a of the German Penal Code [44].

Where the pregnant female expressly opposes the consent of the statutory representative and thus the performance of an abortion, it will be necessary to proceed as for sterilization. If her veto can at least be based on a certain conception of the difficulties she is bound to face, this will lead – except where there is a strict medical indication – to the assertion of consent by the statutory representative as no longer capable of being regarded as in the interests of her welfare. This, in turn, will mean that effective consent is lacking [45].

5. Concluding Remarks

The problems relating to contraception and abortion of mentally handicapped female adolescents have clearly not been exhaustively dealt with in this rather

cursory examination. Nonetheless, some of the essential points affecting doctors have been touched upon. If guidance in making decisions has not turned out to be as concrete as doctors may have hoped for particular cases, this is not necessarily a disadvantage. Freedom of evaluation, decision and action on an individual's own responsibility is thereby conceded. In spite of an understandable desire for legal certainty, doctors ought to be able to appreciate having this discretion, for, particularly as far as this subject is concerned, we in Germany have indeed had other experiences, which were by no means better.

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Notes

1. In this respect, other countries are much better off, since they are able to discuss these problems untouched by the dark shadows of their history: an impressive example is Working Paper 2.4 on Sterilization: implications for mentally retarded and mentally ill persons. Law Reform Commission of Canada, 1979
2. But not necessarily of such a nature that one could speak of an "abnormal sexual instinct" in the sense of the "German Castration Act" of August 15, 1969 (*Gesetz über die freiwillige Kastration und andere Behandlungsmethoden*: BGBl I 1143). Treatment measures in terms of this Act are not dealt with here. A corresponding application of rules of procedure under this Act to the fields of inquiry to be considered here is impossible (LG Düsseldorf FamRZ 1981, 95, AG Kaiserslautern MDR 1981, 229; see also Henke (1976) *Ergänzende Maßnahmen zur Neuregelung des Schwangerschaftsabbruchs*, Neue Jur. Wochenschrift 1773/1775 – advocating extensive adoption of the provisions of the *Kastrationsgesetz* (*KastrG*), from a legal policy point of view). Cf also Hanack (1959) *Die strafrechtliche Zulässigkeit künstlicher Unfruchtbarmachung*, p 320 et seq and note 33
3. See Wimmer (1976) *Ärztliche Sterilisation von Einwilligungsfähigen und Nichteinwilligungsfähigen*. *Renovatio*, p 127
4. BGHSt (= Entscheidungen des Bundesgerichtshofs in Strafsachen) 20 (1966) 81
5. For this reason there is at present no real foundation for the repeatedly expressed fear that a so-called "accommodating sterilization" (*Gefälligkeitssterilisation*) must be seen as contra bonos mores in view of § 6 of the professional rules for doctors (*Berufsordnung für Ärzte*) and could accordingly be punishable under § 226a of the German Criminal Code. On this subject and for further details see Eser (1980) In: Eser/Hirsch (eds) *Sterilisation und Schwangerschaftsabbruch*, p 55 et seqq
6. For individual references to this now generally recognized view in German theory and practice, see Lenckner (1982) In: Schönke/Schröder (eds) *Kommentar zum StGB*, 21th edn, prenotes 39 et seq to § 32, and also Eser (1982) In: Schönke/Schröder, § 223 notes 37 et seqq
7. Cf § 2 sect 1 No 3 *KastrG* (note 2 supra). See further, for example, Hirsch's view in: *Leipziger Kommentar zum StGB*, 10th edn (1981) § 226a note 41
8. Lenckner's term, in: Eser/Hirsch, (*supra* note 4) p 188: "Teilmündigkeit"
9. Cf § 226b of the 1972 draft of a Fifth Criminal Law Reform Act and § 112 Sect 2 *Alternativ-Entwurf* (cf note 25 infra). See further Hanack (1979) *Die strafrechtliche Zulässigkeit künstlicher Unfruchtbarmachung*, p 339, and Wimmer (note 3 supra), p 129 et seq
10. This, in particular, is Lenckner's view, *loc cit* (note 8 supra)
11. See Eser, in: Schönke/Schröder § 223 note 62 (but also note 38). Vice versa, capacity to consent cannot "automatically" be attributed to persons of full age. To the extent that an attempt may be made to avoid a minor's possible capacity to consent by reference to the contra bonos mores provision of § 226a of the German Penal Code – so that a minor's

- power to make his/her own arrangements is disputed either generally or only with regard to sterilization carried out as a favor (*cf* Lenckner, in: Eser/Hirsch, p 189) – it must be countered that according to the German Civil Code there is no room for considerations relating to *contra bonos mores* either on principle or with reference to age
12. This definition of capacity to consent is commonly used in the courts and in theory; certain nuances, however, may be passed over here. *Cf* instead BGHSt 12 (1959) 379/382 and Eser, in: Schönke/Schröder, § 223 note 38 with further references
 13. Even if by virtue of § 1626, Sect 2, of the German Civil Code parents must take into account the “growing ability and desire of children to act independently and on their own responsibility,” such a need for personal decision-making (without parents’ participation) will probably have to be disavowed at least in the cases of irreversible operations that we are dealing with here
 14. *Cf* Bundestags-Drucksache VI/3434 p 41 and Lenckner, in: Eser/Hirsch, p 174, who correctly takes the view that Art 1 of the West German Constitution (*Grundgesetz*) has excluded the possibility of provisions being enacted on the model of the Hereditary Health Act (*Erbgesundheitsgesetz*) of 1933/41
 15. *Cf* Hinz, in: Münchner Kommentar zum BGB, 1978, § 1626 note 44
 16. *Cf* §§ 1773, 1793 of the German Civil Code
 17. *Cf* §§ 6 and 1896 et seqq of the German Civil Code
 18. *Cf* § 1910, Sect 2, of the German Civil Code. In practice, special guardianship of the handicapped is preferred, as indicated by the endeavor as far as possible to allow those affected themselves to collaborate in the making of fateful decisions. On this *see* Goerke, in: Münchner Kommentar, § 1910 note 16 set seqq
 19. *Cf* § 1666, Sect 1, sentence 1, of the German Civil Code. *De lege ferenda* an opportunity for preventive control – which is non-existent under the present law – ought to be created. *Cf* also note 33 *infra*
 20. Bundestags-Drucksache VI/3434 § 226 b
 21. This suggestion was silent on the question of the requisite degree of risk
 22. *See* Lenckner, in: Eser/Hirsch, p 190; Henke (1976) *Ergänzende Maßnahmen zur Neuregelung des Schwangerschaftsabbruchs*. *Neue Jur Wochenschr*, p 1776; Becker (1972) *Das Sterilisationsproblem im neuen Strafgesetzentwurf*. *Z Evangel Ethik*, p 334
 23. Also Lenckner’s view, *ibid*. *Cf* also LG Berlin, *Z Ges Familienrecht* 1971, p 668 (where, however, the decision was incorrectly based on § 4 Sect 2 *KastrG*)
 24. At any rate this argument cannot be controverted on the basis that sterilization is not an *ultima ratio* because an abortion may, if necessary, also be considered. In contradistinction to the comparison between sterilization and other less radical and therefore preferable contraceptive measures, a legal interest (unborn life) not relating to the patient herself is also affected through performance of an abortion
 25. According to the *Alternativ-Entwurf*, *Straftaten gegen die Person*, 1. Halbband, 1970, p 53, the whole complex of sterilization and castration of the mentally ill who are incapable of giving their consent ought to be dealt with in a special administrative law
 26. *Cf* Wimmer (note 3 *supra*), p 130
 27. *Cf* Jürgens, in: Eser/Hirsch, p 16
 28. For a similar view *see* Lenckner, in: Eser/Hirsch, p 190 et seq
 29. *See* Kohlhaas (1968) *Zur Sterilisation bei Minderjährigen aus eugenischen Gründen*. *Dtsch Med Wochenschr*, p 229. Kohlhaas also concludes in favor of allowing prophylactic sterilization on eugenic grounds of minors incapable of consenting; he calls for the intervention of the guardianship court and of the juvenile court service (*Jugendgerichtshilfe*) under existing law, without, however, indicating the legal basis therefore. *De lege lata*, there is at the most the possibility of a voluntary application to the guardianship court in accordance with § 1631, Sect. 3, of the German Civil Code
 30. In this sense Lenckner, in: Eser/Hirsch, p 191 et seq
 31. It is common knowledge that adoption can scarcely be procured for children of mentally handicapped parents
 32. Wimmer (note 3 *supra*), p 131, correctly takes a cautious view
 33. This also applies to foster children and minors under the age of 16 who are living in homes. Although by virtue of §§ 31 and 79 of the Juvenile Welfare Act (*Jugendwohlfahrts-*

gesetz: JWG) such persons are subject to the supervision of the juvenile welfare office, effective preventive control is nevertheless not guaranteed since the duty of foster parents to notify the authorities pursuant to § 32 JWG only relates to the taking in, handing over, change of address and death of the child. In state legislation these duties have been partly extended (see for instance § 14, Sect. 2, sentence 2 of the Baden-Württemberg *Landes-JWG*: duty to notify any change crucial to the granting of permission to act as foster parent that affects the situation of the foster child or parent). The extension of these duties does not, however, cover measures relating to the care of the child. As regards the decision to sterilize a mentally infirm adult, some guardianship courts consider it necessary in an analogous application of § 4, Sect. 2, and § 6 *KastrG* that the consent of the authorized special guardian should be approved. Whether this approach is correct need not be decided here; in any event it is not applicable to minors under parental control

34. *Cf* Bundestags-Drucksache VI/3434 §§ 226 b, 226 c
35. *Cf* § 3 of the Danish abortion statute of 1973, under which an abortion is *inter alia* permissible when the woman as a result of physical or mental affliction or of weakness of aptitude (No 4) or in consequence of her youthful age or immaturity (No 5) is not in a position to care for her child in a satisfactory manner. *See* also § 97 of the Austrian Penal Code of 1975, according to which the minority of the pregnant woman at the time of her pregnancy constitutes a ground for abortion
36. *See* Eser, in: Schönke/Schröder, § 218 a note 6; Lenckner, in: Eser/Hirsch, p 178
37. For this view *see* Bundestags-Drucksache VI/3434 p 29 et seq on the 1972 draft of a Fifth Penal Law Reform Act
38. *See* Eser, in: Schönke/Schröder § 218 a note 6; Lenckner, in: Eser/Hirsch, p 178
39. Eser, Lenckner *loc cit* (note 35 *supra*)
40. For further details regarding the general indication for a precarious situation, including problems of adoption, *see* Eser, in: Eser/Hirsch, p 160 et seqq
41. *Cf* Eser, in: Schönke/Schröder, § 218 a note 38
42. *See* Lenckner, in: Eser/Hirsch, p 177
43. Competence to act as representative in case of incapacity to consent is not restricted to particular indications but is general: *see* Eser, in: Schönke/Schröder, § 218 a note 58
44. Apart from the control of abuse under § 1666 of the German Civil Code, there is no provision under existing law for participation by the guardianship court in making the decision; *cf* also note 33 *supra*, and regarding legal policy Henke (note 22 *supra*)
45. *Cf* Lenckner, In: Eser/Hirsch, p 179